

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch**

Prince Market #6,

Appellant,

v.

Case Number: C0203199

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS) that the permanent disqualification from the Supplemental Nutrition Assistance Program (SNAP) imposed upon Prince Market #6 (hereinafter “Appellant”) by the Retailer Operations Division, Investigations and Analysis Branch, hereinafter “ROD Office” is hereby sustained.

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a) and 7 CFR § 278.6 (e)(1) and (i) in its administration of the SNAP when it imposed a permanent disqualification upon Appellant.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 279.1 provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

In a letter dated November 13, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of April through September 2017. The letter noted that the sanction for trafficking is permanent disqualification, as provided by 7 CFR §278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR §278.6(i). The record reflects that the SNAP Office received and duly considered Appellant’s reply to the Charge Letter. By a letter dated December 11, 2017, Appellant was informed that it was permanently disqualified from participation as a retail store

in the SNAP and was ordered upon receipt of the letter to cease accepting SNAP benefits; consequently, Appellant ceased to accept said benefits. On December 15, 2017, Appellant requested an administrative review of the SNAP Office's decision; the request was granted.

STANDARD OF REVIEW

In appeals of adverse actions an appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the **Food & Nutrition Act of 2008**, as amended, at 7 U.S.C. § 2021 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6 (e)(1)(i) of the Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, in part:

...a disqualification under subsection (a) shall be...permanent upon...the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards...

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the **Food & Nutrition Act of 2008**, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, **evidence obtained through a transaction report under an electronic benefit transfer system...** (Emphasis added.)

7 CFR § 278.6(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in §271.2

7 CFR § 271.2 states, in part:

Trafficking means the buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers, (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.

7 CFR §278.6(f)(1) states, in part:

A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR §278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations...

7 CFR §278.6(b)(2)(iii) states, in part:

If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in §278.6(b)(1), the firm shall not be eligible for such a penalty.

SUMMARY OF THE CHARGES

- A series of multiple SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were debited from individual benefit accounts in unusually short time frames (Attachment 1).
- A series of SNAP excessively large transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were debited from recipient accounts (Attachment 2).

APPELLANT'S CONTENTIONS

In Appellant's reply to the Charge Letter, and in its written request for review dated December 15, 2017, it was argued that:

1. Appellant does not accept or condone unethical, illegal or fraudulent activities.
2. All employees are trained for two weeks before handling SNAP transactions and are instructed not to participate in any suspicious activity.
3. Appellant was not aware of the transaction activity at issue until receiving the Charge Letter.
4. If the ROD Office had contacted the business sooner, the firm could have asked the employee for an explanation; however, that employee's last day was in mid-September.
5. Appellant suggests that ROD question card holders for information.

ANALYSIS AND FINDINGS

At the outset it should be noted that the ROD Office ordered a contracted store visit to the Appellant firm as part of its investigation into Appellant's questionable transaction activity; the visit was conducted on September 23, 2017, as a result of which documentation was obtained, including photographs of the interior and exterior of the store, a store layout diagram and a store inventory survey. This documentation reflected the following:

- Estimated square footage of store: 1020

- No optical scanners.
- No shopping carts or baskets.
- Night window used.
- Prices in standard retail variations of \$.x9.
- One checkout counter, two cash registers, one card reader.
- Food storage area out of public view, approximately 384 square feet.
- No food stored offsite.
- No phone, online or other orders taken.
- No delivery offered.
- No transaction rounding.
- Four most expensive items:
 - Pedialyte - \$8.99 for 1.1 quart.
 - Cheese - \$6.99 per pound.
- All above questions were completed in collaboration with store personnel.
- The firm also sold tobacco, alcohol, lottery tickets, over-the-counter medicines, health and beauty supplies, paper goods, cleaning supplies, jewelry, housewares and other non-food items.
- No kitchen/food preparation area.
- No dining area.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Reviewer noted that in collaboration with store personnel there were fewer than four SNAP-eligible items priced at \$5.00 or more.
- Checkout area approximately 1 X 1 foot and behind Plexiglas barrier. Photos: 6, 24 and 27.
- Partially/sparsely-stocked coolers/shelves. Photos: 1, 2, 7, 9, 13, 19, 28, 30, 31, 33, 35, 38 and 39.
- Firm was a typically-stocked convenience store in all relevant respects. Photos: 5, 6, 11, 15, 23, 24, 26, 27, 41 and 48.
- Storage area contained primarily soda and beer. Photos: 34 and 42.
- The firm appeared to operate substantially as a liquor store. Outdoor signage advertises liquor. Photos: 6, 11, 24, 29, 32, 34, 41, 42, 44 and 48.

The documentation presents no indication of advertised specials, promotions, bulk or expensive food items. The checkout area was set up in convenience store fashion, utilizing a small check-out area (approximately 1 by 1 foot of useable space) but was otherwise surrounded by snack items, candy, health and beauty products, over the counter medicines, tobacco products, alcohol, jewelry and other non-food items. There were no shopping carts or baskets with which customers could transport large orders to the small check-out area or to waiting transportation. This documentation reflects that the firm was typically-stocked convenience store in all relevant respects. It is worth noting that the average SNAP purchase in a convenience store in the state of California during the analysis period was \$7.05, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, Appellant provides no rationale or evidence to explain the implausible transactions detailed in the ROD Office's Charge Letter. As noted in the foregoing

(page 1 above), Appellant bears the burden of demonstrating, by a preponderance of the evidence, that the transactions at issue were in fact not due to SNAP-benefit trafficking. Denials that any violative activity took place must be supported by demonstrative and compelling evidence.

Regarding contention 2 above, similarly, that the firm engaged in training efforts prior to the transaction activity at issue does not disprove SNAP-benefit trafficking. Moreover, Appellant provides no documentary support of its training efforts. Lastly, training efforts are relevant to the present case to the extent the Appellant is presenting an implied request for consideration of a civil money penalty in lieu of a permanent disqualification for trafficking; however, merely stating that the firm trained employees at some point in the past does not appear to be a clear request for such consideration and, moreover, would dramatically fail to meet the documentary requirements of 7 C.F.R. § 278.6(i) for such requests. No further findings are rendered in this regard.

With regard to contention 3 above, Appellant has asserted that the Owner of the firm had no knowledge of violations of the SNAP regulations, implies that the Owner did not personally commit violations of the SNAP regulations and may imply that an employee responsible for managing the firm committed the violations. This contention cannot be accepted as a valid basis for dismissing any of the charges or for mitigating the impact of the violations upon which they are based. Appellant is liable for all violative transactions handled by full or part-time, paid or unpaid store personnel, whether or not ownership is aware of such transactions. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons to whom ownership delegates responsibility to act on behalf of the firm would render virtually meaningless the enforcement provisions of the **Food & Nutrition Act of 2008** and the enforcement efforts of the USDA. Additionally, ownership of the Appellant firm signed an FNS-252, SNAP Application for Stores, on October 12, 2012, as well as additional certifications during periodic reauthorization, by means of which Appellant acknowledged and agreed to accept responsibility to prevent violations of the program by any and all employees of the firm. Moreover, owners may indeed be held accountable for the actions of employees, regardless of the owner's lack of knowledge of violations. A permanent disqualification of even an "innocent owner" is consistent with the legislative history of the statute and regulations. Furthermore, culpability need not be imputed to an owner through the actions of an employee if the owner was involved in the violative activity, whether accidentally or otherwise. Again, to allow store ownership to disclaim accountability for the acts of persons to whom the responsibility to handle store business has been assigned would render inert the enforcement provisions of the **Food and Nutrition Act of 2008** and corresponding provisions of the regulations.

In regard to contention 4 above, the record reflects that the ROD Office analyzed Appellant's transaction data for the period April through September 2017; the store visit was conducted, as noted, on September 23, 2017. The ROD Office completed its analysis/investigative work and issued the Charge Letter in early/mid-November, not in any way an inordinate amount of time or beyond the agency's case processing standards. Moreover, as noted in the foregoing, Appellant

is responsible for the actions of any/all employees. Furthermore, the contention provides no explanation or rationale for the transaction activity at issue.

Regarding contention 5 above, the record reflects that the ROD Office did in fact conduct an analysis of household transaction activity and found that households shopped at much better-stocked super stores, supermarkets and grocery stores on or about the same day as conducting implausible transactions at the Appellant firm, calling into question what these households could obtain at Appellant's typically-stocked convenience store that they could not obtain at the better-stocked and very likely more competitively-priced stores (super stores and supermarkets are typically the most competitively-priced firms in a given area). The ROD Office notes that, at the time of the sanction decision, there were 113 SNAP-authorized stores within a one-mile radius of the Appellant firm, including two super stores, five supermarkets, four medium grocery stores, 31 small grocery stores, five combination grocery/other stores, one meat specialty store, one bakery specialty store, 55 other convenience stores and seven SNAP-authorized restaurants. The Appellant store was clearly not the only store in the immediate area offering food items to SNAP customers; it was clearly not the best-stocked firm in the area and it was clearly not the only store being visited by Appellant's customers.

While there are legitimate reasons why a SNAP recipient or household member might return to a convenience store during a short period of time, such purchases are more typically in small amounts and for obtaining just a few items. The examples in Attachment 1 indicate a series of repetitive purchases that total large amounts. Customers spending such substantial amounts of SNAP allotments in a typically-stocked convenience store, when there are other larger food stores nearby which carry substantially larger varieties of food at lower costs, is implausible. Lastly, large transactions for the purchase of legitimate food items (which at this store would have been a substantial number of lower priced items), using no shopping carts and very little checkout-counter space, is additionally implausible. Multiple transactions over a short period of time, especially of high dollar value, are very suspicious because they are typical of stores and SNAP customers which are attempting to diminish attention to signs of SNAP-benefit trafficking. Frequent and large transactions conducted in order to purchase eligible foods at Appellant's store are highly unlikely given Appellant's logistical wherewithal and store stock. The record reflects, as noted above, that the Appellant firm was a typically-stocked convenience store in all relevant respects and provides no plausible bases for customers' unusual attraction to the firm and unorthodox transaction patterns.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The ROD Office further notes that the Charge Letter contained numerous transactions exhibiting similar or identical digits, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The purchase of a cart or basket (which Appellant did not provide to customers, calling into question how large orders were transported to the register or to waiting transportation) of eligible food items typically approximates a random total amount. The transactions in the Charge Letter do not resemble random numbers but rather clearly appear contrived.

CONCLUSION

In view of the above, the decision of the ROD Office to permanently disqualify Appellant from participation in the SNAP is hereby sustained. The decision will become final upon the 30th day following Appellant's receipt of this document.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the provisions of the Freedom of Information Act (FOIA), FNS is releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

DANIEL S. LAY
Administrative Review Officer

July 25, 2018